Office-Supreme Court, U.S.
FILED
FEB 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEWELL WEST a/k/a JEWELL A. WEST,

Petitioner,

vs.

LEE ROY WEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I

THE PETITIONER FOR WRIT OF CERTIORARI AND BRIEF OF PETITIONER DOES NOT FAIRLY PRESENT THE QUESTION DETERMINED BY THE SUPREME COURT OF OKLAHOMA.

The question presented in petitioner's brief and the argument in support thereof, does not fairly present the total facts surrounding the decision of the Supreme Court of

Oklahoma, nor does it present the full authority and grounds upon which the final decision of the Court rested.

Petitioner has restricted her question presented to the validity of a state civil procedure statute whereby notice was perfected by publication against an out of state defendant whose "alleged" mailing address was determined prior to entry of default judgment. The question not presented by petitioner, but as shown by all facts before the Trial Court, Court of Appeals and Supreme Court of Oklahoma, is the undisputed fact that at the time service by publication was initiated and perfected, in complete accordance with applicable Oklahoma law, that the whereabouts of petitioner was totally unknown and it was not until after the notice had been published that petitioner "surfaced" as her address became known. (See District Court Findings of Fact - page 17a of Petitioner's Brief.)

The District Court made an extensive finding in its Decree of Divorce, reproduced in full at page 8a of petitioner's brief, that the Notice by Publication was proper and met all statutory requirements and minimum standards of state and federal due process of law and that the respondent had no knowledge of petitioner's location or whereabouts at the time publication service was perfected. The Oklahoma Court of Appeals confirmed this finding in its opinion found at page 23a of petitioner's brief and the Supreme Court of Oklahoma confirmed said finding in denying certiorari.

The District Court and the Oklahoma Court of Appeals discussed in their respective decisions, *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968), which decision was predicated upon and adopted the standards of this Court's decision in *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and *Schroeder v. City of New York*, 371 U.S. 208, 83

S.Ct. 279, 9 L.Ed.2d 255 (1962). Both the District and Appeals Court found that the prerequisites for proper service by publication had been met.

II

THE DECISION OF THE SUPREME COURT OF OKLAHOMA RESTED ON OTHER INDEPENDENT AND NON-FEDERAL GROUNDS.

This Court has consistently held that it will not review the judgments of state courts which rest on adequate non-federal grounds and that when a decision could have been based on either federal or state grounds and the state ground is sufficient to sustain said judgment, that the matter will not be subject for review by the United States Supreme Court. *Dixon v. Duffy,* Cal. 1951, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46; *Young v. Ragen,* Ill. 1949, 69 S.Ct. 1073, 337 U.S. 235, 93 L.Ed. 1333; and *Lamb Enterprises, Inc. v. Kiroff,* D.C. Ohio 1975, 399 F.Supp. 409, reversed on other grounds 549 F.2d 1052, certiorari denied 97 S.Ct. 2927, 431 U.S. 968, 53 L.Ed.2d 1064.

Petitioner commenced her action on April 16, 1979 by filing with the District Court of Osage County, Oklahoma (Trial Court) a Motion to Vacate Judgment entered by said court on March 7, 1979.

Vacation of judgments is governed by legislatively enacted statutory proceedings in Oklahoma, namely, Section 1031 of Title 12, Okla. Stat., and Section 176 of Title 12, Okla. Stat. In accordance with, and not disputed by petitioner at any stage of the proceedings, or in her brief before this Court, petitioner was required to allege and prove the necessary facts

which would warrant the Trial Court vacating the judgment under 12 Okla. Stat. §176.

The controlling portion of 12 Okla. Stat §176 applicable to this case is:

> "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall . . . make it appear to the satisfaction of the court, by affidavit, or other evidence *that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense*; . . ." (Emphasis added)

The District Court and Court of Appeals by their respective decisions reproduced in full at page 17a and 23a of petitioner's brief, and the Supreme Court of Oklahoma by denying certiorari, all found that petitioner in this case had "actual notice and knowledge of the pendency of the action in time to appear and make her defense" and by reason thereof, was not entitled to have the judgment vacated. In fact, the evidence showed that she not only had actual notice, but had talked with an attorney concerning the matter. (See Appeals Court Decision, page 25a)

The decision of the Supreme Court of Oklahoma, supported in part by its prior decision, *Gann v. Gann,* 469 P.2d 605 (Okla. 1969), held that since petitioner had actual notice before judgment in time to defend and chose to ignore it, she was prevented from seeking post vacation of the judgment under 12 Okla. Stat. §176.

As stated by the Oklahoma Court of Appeals in its decision:

> "The dispositive issue herein centers around the issue of whether or not the appellant (petitioner herein) had

actual notice of the proceedings in time to appear in court and make her defense."

"The facts of this matter as affirmatively shown in the letter of February 5, 1979, produced as plaintiff's (respondent herein) Exhibit No. 1 at the hearing on July 7, 1979, specifically recites the appellant (petitioner herein) has notice of the publication in the newspaper that the plaintiff (respondent herein) had filed an action for divorce."
(page 27a of petitioner's brief)

Therefore, the decision of the Oklahoma Court rests on the undisputed facts that the petitioner herein did have actual knowledge of the pendency of this action in time to defend, and therefore, in accordance with the provisions of 12 Okla. Stat §176, her Motion to Vacate Judgment was properly overruled by the District Court.

Nowhere in the proceedings at state court level did petitioner herein question the validity of 12 Okla. Stat. §176 or raise any constitutional question with regard to the same. Petitioner's sole case is based upon the validity of service through the publication notice, but as can be seen this was not the determinative issue to be decided under Oklahoma law in determining whether petitioner could be successful in attempting to vacate the judgment. The question was one of "actual notice" to entitle petitioner to the benefits of the Oklahoma Statute, and petitioner failed to prove and in fact the record affirmatively shows that she did have actual notice of all proceedings in time to properly defend.

By Oklahoma Statute, the controlling basis and grounds upon which the decision of the Oklahoma Supreme Court rested was its finding and adjudication that the petitioner herein was not entitled to vacation of the judgment by statute, which decision is purely a non-federal question. Therefore, such decision by the Supreme Court of Oklahoma should not

be subject to review by this Court under authority heretofore cited.

III

THE PROCEDURE FOR SERVICE BY PUBLICATION DID MEET ALL STATUTORY REQUIREMENTS AND MINIMUM STANDARDS OF STATE AND FEDERAL DUE PROCESS OF LAW.

Notwithstanding that the decision of the Supreme Court of the State of Oklahoma is primarily founded on its application of the facts to procedural statutes for vacating judgments, the court did consider, and the evidence clearly shows, that the method employed for service by publication was proper. The District Court, Court of Appeals and the Supreme Court of Oklahoma all found that the publication service was proper and met statutory requirements and minimum standards of state and federal due process of law.

In *Mullane v. Central Hanover Bank and Trust Company, supra,* this Court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

This rule of law and the standards promulgated by the Court in the *Mullane* decision has been restated by the court many times and in particular in *Schroeder v. City of New York, supra.*

The Supreme Court of Oklahoma adopted said rule and

standards provided therein in their decision in *Bomford v. Socony Mobil Oil Co., supra.* Therein the Oklahoma Supreme Court held:

> "The general rule that emerges from *Mullane* and subsequent cases is simple: A state cannot invest itself with, and exercise through its court, judicial jurisdiction over a person in a proceeding which may directly and adversely affect his legally protected interest, unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard."

In the case at bar, the District Court as well as the Court of Appeals in their decisions made specific reference to the above cited cases and in particular to the decision of the Supreme Court of Oklahoma in *Bomford.* The Oklahoma Court of Appeals in applying the rule of law and standards set down in *Bomford* as adopted from *Mullane,* to the facts in this case, held:

> "The method of notice by publication in the West case (case at bar), was proper in all respects and so held by the Trial Court. Since the intent or purpose is to give the party being sued knowledge or notice in time to respond to said suit, said purpose was achieved in this case as the appellant (petitioner herein) in her letter dated February 5, 1979, to the appellee (respondent herein) acknowledged the fact that the newspaper carried a notice that he had filed against her for divorce, she even contacted legal counsel to ascertain her rights of the matter. Therefore, the prerequisites of *Bomford v. Socony Mobil Oil Co., supra,* were met."
> (page 27a of petitioner's brief)

The clear question before the court in Oklahoma at all stages and before this Court, was the fact that the publication notice was in all respects proper and it was not until after the

publication notice had become effective that the respondent herein had any knowledge as to the whereabouts of the petitioner; that petitioner had actual notice of the divorce proceedings in more than ample time to defend (a minimum of 26 days). (page 29a of petitioner's brief)

The decision of the Oklahoma Supreme Court is directly in line with the previous decisions of this Court as to granting due process of law in matters involving notice by publication and the rules and standards applied by the Oklahoma court are as previously established by this Court in *Mullane.*

IV

PETITIONER HAS NOT FAIRLY OR CORRECTLY STATED CERTAIN EVIDENTIARY FACTS.

On appeal to the Court of Appeals of Oklahoma, this respondent suggested in his answer brief that based on certain statements petitioner made in her brief that she had either misunderstood the evidence or had misread the transcripts of evidence. However, such misunderstanding or misreading does not normally happen a second time and, therefore, respondent herein is compelled in proper representation of his client to state to this court that petitioner has in her brief intentionally misstated undisputed factual evidence.

In particular, appearing at page 11 of petitioner's brief is a statement stating that in *Bomford, supra,* plaintiff therein had not exercised due diligence in locating the address of defendant prior to publication notice - Petitioner goes on to state that in the case at bar, the respondent "not only knew the whereabouts of the petitioner, he intentionally misled the

court when on the date for the default judgment he failed to state that he was aware of petitioner's whereabouts". Several lines further on, petitioner indicates that such action was fraudulent. These statements are absolutely and unequivocally false.

The District Court and the Court of Appeals affirmatively found from the evidence introduced that respondent had no knowledge whatsoever of the whereabouts of the petitioner at the time the petition and affidavit for notice by publication were filed and publication notice started. The Decree of Divorce entered by the Trial Court, reproduced in full at page 8a of petitioner's briefs, shows at the bottom of page 9a that the plaintiff himself (respondent herein) introduced into evidence the letter from the defendant (petitioner herein) dated February 5, 1979, which advised the plaintiff that she had seen or had knowledge of the notice of publication in the newspaper about the divorce and had contacted a law firm. That was the same letter that gave her address. The first letter which gave any indication of her address was received on January 27, 1979, but the affidavit for service by publication was filed on January 16, 1979 and the first publication commenced on January 19, 1979 (page 24a of petitioner's brief).

After discussing fully the evidentiary facts before the Trial Court, the Oklahoma Court of Appeals in its final decision stated in part:

> "The method of notice by publication in the West case was proper in all respects and so held by the Trial Court."
> (page 27a of petitioner's brief)

Petitioner in the argument portion of her brief implied and suggested to this court that her whereabouts was known or could have been easily ascertained by respondent prior to

filing the affidavit for notice by publication. The evidentiary facts before the Oklahoma courts clearly disproved this statement. The Decree of Divorce entered by the District Court as well as the opinion of the Oklahoma Court of Appeals, both recite sufficient facts to inform this Court that such statements by petitioner are not factual and that those facts did not exist. The evidence was absolutely to the contrary showing that the respondent, using every method available, tried for five months to locate the petitioner to no avail as she secretly kept here whereabouts hidden. (See Appeals Court decision at page 24a of petitioner's brief.)

V

CONCLUSION

Based on the principles above set forth, the decisions and rules of this Court, respondent respectively states to this Court that the decision of the Supreme Court of Oklahoma (1) rests on independent non-federal ground and (2) the decision as to any federal question is not in conflict with any prior decision of the Oklahoma court or this Court but is in direct line with previous decisions of the Oklahoma Supreme Court and this Court. Therefore, respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

/s/ W. Robert Wilson

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing brief in opposition to the petition for certiorari was duly mailed to counsel of record, Jack Duane Heskett and Frederick Scott Esser, 502 Union Bank & Trust bldg., Bartlesville, OK 74003, with postage prepaid thereon.

/s/ W. Robert Wilson

W. Robert Wilson